Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Antony David Scott, Jennifer Thacker, Katarina Sliacky and Ada Li,

complainants,

and

International Association of Machinists and Aerospace Workers,

respondent,

and

United Airlines, Inc.,

employer.

Board File: 29151-C
Neutral Citation: 2014 CIRB 710
January 31, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson and Messrs. John Bowman and Terence Lineker, Members. A hearing was held on October 1–4, 2012, and May 13–16, July 23–24 and October 8, 2013.

Appearances

Mr. Ib S. Petersen, for Antony David Scott, Jennifer Thacker, Katarina Sliacky and Ada Li;

Mr. Bruce A. Laughton, Q.C., for the International Association of Machinists and Aerospace Workers;

Messrs. Douglas G. Gilbert and Shane Todd, for United Airlines, Inc.

These reasons for decision were written by Mr. Graham J. Clarke.

I. Nature of the Complaint

[1] On December 5, 2011, the Board received an unfair labour practice complaint from four former United Airlines, Inc. (United) employees: Mr. Antony David Scott; Ms. Ada Li; Ms. Jennifer Thacker and Ms. Katarina Sliacky (collectively "Complainants").

[2] The Complainants, all of whom had significant years of service with United at the time of their terminations, complained that their bargaining agent, the International Association of Machinists and Aerospace Workers (IAMAW), had violated its duty of fair representation (DFR) under section 37 of the *Canada Labour Code (Part I - Industrial Relations)* (*Code*):

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[3] In March, 2011, United terminated seven long service employees, including the four Complainants, for alleged ticketing irregularities. During the summer of 2011, the IAMAW succeeded in having three of the seven employees reinstated, but refused to take the Complainants' terminations to arbitration.

[4] The Board has been satisfied that the IAMAW, despite initially meeting the duty it owed the Complainants, violated the *Code* when it ceased virtually all contact with them while obtaining reinstatement for the other three employees. For example, the Complainants only learned as the Board's hearing unfolded that some of the successfully reinstated employees had apparently blamed them for the alleged ticketing irregularities. The IAMAW never put these potentially prejudicial allegations to the Complainants.

[5] These are the reasons for the Board's decision.

II. Chronology of Events

[6] As the table below illustrates, the four Complainants had significant seniority with United at the time of their March 2011 terminations:

Name	Employment Dates	Service Length
Ada Li	November 6, 1992–March 3, 2011	18 years, three months and three days
Jennifer Thacker	May 1, 1994–March 3, 2011	16 years, 10 months and three days
Katarina Sliacky	February 9, 1998–March 3, 2011	13 years and three days
Anthony David Scott	June 13, 1998–March 12, 2011	12 years, eight months and three days

A. February, 2011

[7] In February, 2011, United sent its US-based internal auditors to interview seven of its employees working at the Vancouver International Airport. The interviews took place from February 22–24, 2011. The subject matter discussed at the interviews revolved around alleged ticketing irregularities.

[8] IAMAW local Shop Stewards attended each separate meeting United held with the seven employees and took notes of the proceedings (Ex–3; Tabs 1, 9, 17 and 29).

B. March, 2011

[9] On March 3, 2011, Ms. Li, Ms. Thacker and Ms. Sliacky all received from United a virtually identical disciplinary Form informing them of the termination of their employment for cause.

[10] On March 12, 2011, United terminated Mr. Scott using the same Form. Mr. Scott's termination took place nine days later, since he had been overseas when United terminated the other Complainants.

[11] Three other United employees were similarly terminated for cause for an overall total of seven.

[12] In its Form, United described the violation which it alleged justified the terminations:

> You were involved in ticket transactions for either yourself or co-workers and friends. Tickets were purchased, and then subsequently the flights were changed to different dates, to higher and more expensive booking codes, with no collection of the fare increase due to the company. Further, change fees were waived.
>
> Please see the attached for specific examples.

[13] The IAMAW immediately filed grievances after the terminations. On or about March 18, 2011, the IAMAW provided the Complainants with the documentation it had received from United.

[14] In late March, the IAMAW met individually with the seven grievors. Ms. Tania Canniff, an IAMAW General Chairperson, along with Senior Steward Ms. Janet Andrews, and Shop Stewards Ms. Julie Gordon and Ms. Laura Sharp, attended on behalf of the IAMAW.

C. April, 2011

[15] Ms. Canniff typed up the notes of the individual meetings held in March, 2011 with the Complainants (Ex-3; Tabs 3, 11, 19 and 28) which summarized their explanations. Ms. Li, Ms. Sliacky and Mr. Scott immediately provided Ms. Canniff with further written explanations about United's documentation in advance of Step 3 of the grievance process. On May 11, 2011, Ms. Thacker sent Ms. Canniff her explanations arising from United's documentation (Ex-3; Tab 29).

[16] Step 3 "hearings" took place on May 12, 2011 for each of the Complainants. Each Complainant had his/her own individual "hearing".

[17] Step 3 in United's grievance procedure was novel for the Board, at least in the Canadian context. Step 3 was more akin to an internal oral hearing. Both United and the IAMAW made oral presentations about the case.

[18] United, which would later write a Step 3 "Decision", set out its position concerning each terminated employee. Ms. Caniff made oral representations on behalf of each grievor. The grievors also had an opportunity to comment on the specific allegations arising from the documentation.

D. June, 2011

[19] On June 1, 2011, United issued separate Step 3 Decisions dismissing all seven grievances, including those of the Complainants. The individual decisions purported to weigh the evidence and come to a conclusion, as if United were acting as an arbitrator.

[20] Ms. Canniff sent an identical email (Ex–1; Tab 2(h) for example) to each Complainant on or about June 2, 2011 enclosing United's Step 3 Decision and describing the IAMAW's process for deciding whether to go to arbitration:

> Please find attached the employer's decision in response to the grievance and step 3 hearing.
>
> **The next step in the process is that the Committee of General Chairpersons will review the grievance to determine whether or not we will proceed to arbitration**. A majority decision of the committee is required to proceed or not proceed. If the committees decision is to proceed, the employer will be notified and an arbitration will be scheduled in accordance with the provisions of the collective bargaining agreement. If the committees decision is not to proceed you will have the right of appeal in accordance with District Lodge policy, which will be outlined in our correspondence to you.
>
> We will ask the employer to hold all time limits in abeyance, pending our review.
>
> Let me know if you have any questions, otherwise I will be in contact following our review.
>
> [*sic*]
>
> (emphasis added)

[21] Ms. Canniff testified during her examination in chief that she also requested the Complainants' comments on the Step 3 Decision which they all provided shortly thereafter.

Ms. Andrews, in her June 3, 2011 email, asked Mr. Scott to "pick apart" United's decision (Ex-2; Tab 7(e)).

[22] On June 2, 2011, Mr. Scott emailed Ms. Canniff and contested the accuracy of the Step 3 Decision:

> Hi Tania,
>
> Where is this pride in tl17 compliance coming from? Not once did I ever say that, he asked me what my role in that was and that was it. How in 30 minutes of talking is all that he got out of what I said? My words were completely twisted.

[23] On June 3, 2011, Ms. Thacker emailed Ms. Canniff:

> Hi Tania,
>
> Thanks for the email.
>
> I must say, briefly reading the attachment, there are a lot of discrepancies in what was written and in fact what was said..... I hope this document does not hold the greatest weight in things or it will need an amendment.
>
> Thanks for all the hard work and waiting for the next steps.
>
> Jen

[24] On June 6, 2011, Ms. Sliacky emailed Ms. Canniff and set out various concerns she had with United's Step 3 Decision:

> After reading closely the decision after step 3 meeting I need to respond to all wrong accusations against me.
>
> * I did not personally benefit from these changes*
> * For one change I did ask my Lead agent for an approval*
> * I did not change any tickets and use INVOL for my husband's travel at all
> * I never forced fares into the system or held seats*
>
> and UA in YVR never held shift briefings where any ticketing issues would be addressed. It all feels unfair and unjustified.
>
> I appreciate all your efforts to get my job back and hope you see it the same way as I do and will continue to fight further.
>
> Thank you
>
> Katarina

[25] On June 11, 2011, Ms. Li wrote an email (Ex–3; Tab 6) to Ms. Canniff and Ms. Andrews which attached two pages of comments about United's Step 3 Decision:

> Dear Tania and Janet,
>
> Enclosed please find an attachment in reference to the Third step Decision. If there is anything else I should be doing, please let me know. Thank you for all your efforts and works [*sic*] in this matter.

[26] On June 22, 2011, Mr. Scott sent Ms. Canniff another email with his attached 3-page commentary in response to United's Step 3 Decision (Ex–3; Tab 14).

[27] Ms. Canniff did not respond to these emails from the Complainants.

[28] Ms. Canniff described in her testimony that she met with United for collective bargaining in late June, 2011. During the final bargaining session on June 29, 2011, they discussed settlement of the grievances. No notes or other documentation exist about these discussions.

E. July, 2011

[29] During the summer of 2011, Ms. Canniff had to deal with multiple and significant family losses. Ms. Canniff took compassionate leave in July 2011, but remained in charge of the Complainants' terminations. The Complainants were aware of, and sympathetic to, Ms. Canniff's losses.

[30] On July 3, 2011, Ms. Thacker wrote to Ms. Canniff expressing sympathy for the latter's losses, and asked for an update:

> Hi Tania,
>
> I am sorry to hear about your loss…
>
> From hearing, from my fellow United 7 (as one of us, dubbed ourselves), you are out of the office and that negotiations are going on. **However, a little update would help ease some of the stress for us involved (as I am sure you are aware from your experiences, that in one form or another we are feeling stress). Could you give us a timeline. We understand that it might be subject to change. When would the earliest time you would be meeting with the other 2 General Chairpersons?**
>
> Also, during these negotiations, will buy outs not be tabled as 10% of the YVR staff are gone?

Are you wanting a line by line break down of the written decision given by Mark Vickery. I have made notes, but 95% of the content is the same on Ada's and Tony's, and one can only assume, the same on the other 4.

Thank you,

[*sic*]

(emphasis added)

[31] On July 28, 2011, Mr. Scott wrote to Ms. Canniff to express his sympathy for the family losses she had suffered. He also expressed his concern about arbitration time limits:

Hello Tania,

I am sorry to hear about your family and you have my sympathies during this time. I was wondering if we need to start worrying about time limits when it comes to arbitration. I was reading the contract tonight and in Article 12, Paragraph E it states that a dispute must be filed within 30 days after exhausting the step 3 procedures or the board will not hear the case. We are coming up to the 2 month mark for from the date of the company decision (01 June 2011) and well past the 30 day mark. I hope that we will be ok in that regard as we still have not heard if the Union has decided to proceed.

[32] Exceptionally for this time period, Ms. Canniff responded on July 29, 2011 to Mr. Scott's email and confirmed that time limits had been placed in abeyance:

Hi Tony:

All time limits are currently held in abeyance, so there is not [*sic*] concern regarding the timeline.

Tania

F. August, 2011

[33] Ms. Canniff returned to work in August, 2011 after her compassionate leave, but was away from the office on training from August 2–15, 2011 inclusively.

[34] In August, 2011, the Complainants started to hear rumours that United might reinstate the other three terminated employees.

[35] On August 10, 2011, Mr. Scott wrote to Ms. Canniff, as well as Ms. Andrews, about these rumours:

> Hello Janet / Tania,
>
> I know you have told us to not listen to rumours but I heard from multiple sources and one fairly close to one of us that 3 people are to get their jobs back soon. Is this true?
>
> In Solidarity,
>
> Tony

[36] Only Ms. Andrews responded. This lead to Mr. Scott's follow up August 11, 2011 email:

> Hi Janet,
>
> I appreciate the communication.. its so hard when we all we get is snipits of gossip and speculations from those "not" in the know but claim the Union told them so.
>
> Tony
>
> [*sic*]

[37] On August 15, 2011, which happened to be Ms. Canniff's first day back in her office after six weeks of compassionate leave, collective bargaining sessions and external training, United sent her reinstatement agreements for three of the seven terminated employees. Two of the terminated employees signed them on August 16, 2011, while the third signed on September 2, 2011.

[38] Ms. Canniff testified that no notes, emails, drafts or any other documentation existed about these agreements.

[39] On August 16, 2011, Ms. Thacker, on behalf of the Complainants, wrote to Ms. Canniff and expressed frustration with the lack of any response from the IAMAW to their various queries:

> Hello,
>
> I am sorry I have been force to write this email, but we need some answers.
>
> It has been frustrating and confusing for the last 2 months.
> Yes, we understand, there are negotiations on.
> Yes, we understand and shown compassion during the personal hardships.
> Yes, we understand that vacations occur.

Yes, we understand that training occurs.

What we do not understand is the lack of response to us; lack of information; or lack of updates.

There are seven of us; loyal, hardworking United Airline Union members who deserve and expect this issue to be dealt with expediantly.

These are our questions:

When would you be scheduling a General Chairperson meeting?
Are they on a set schedule?
Are you not going to set up a General Chairperson meeting until the negotiations are done?
If, you wait until the contract it signed, then how quickly is a meeting arrange ... 1 week .... 1 month....?
Are things going on in the background, that you are working on, that we are unaware of?
Is there any truth to Tina Birring getting her job back?
Is there any truth to Maria Riveria getting her job back?
Is there any truth that Venus Bermudez getting her job back?

We think it is wonderful if you have had success with getting those 3 back to work, we therefore, expect, that the rest of us will be recalled to work shortly, as we were all accused of the same wrong doing ..... breaking Code of Conduct Number 2.

This email was sent and approved by Katarina Sliacky, Tony Scott, and Ada Li.

Thank you

Jen

[*sic*]

(emphasis added)

[40] On August 16, 2011, Ms. Canniff emailed the Complainants and indicated that the IAMAW had reached an agreement with United to reinstate three of the seven employees. Ms. Canniff indicated that the Complainants' individual cases would go to a Committee of General Chairpersons (GC Committee) which would review the evidence. Ms. Canniff and two other IAMAW General Chairpersons would constitute the "GC Committee".

[41] Ms. Canniff advised the Complainants that if the GC Committee decided not to take their grievances to arbitration, then they would provide them with a letter "summarizing the reasons for our decision...", as illustrated by the email to Ms. Sliacky (Ex–2; Tab 4 (d)):

I am writing to advise that we have not been successful in our continued efforts to resolve the grievance with the employer.

A summary of the evidence is being prepared and will be provided to the Committee of General Chairpersons this week who will review the grievance to determine whether or not we will proceed to arbitration. As I advised previously, a majority decision of the committee is required to proceed or not proceed. If the Committees' decision is to proceed, the employer will be notified and an arbitration will be scheduled. The parties have agreed to an arbitration board in accordance with the provisions of the collective bargaining agreement and an arbitrator has been selected. Based on the arbitrators availability the matter would likely be heard in December 2011 and a decision rendered within 30-60 calendar days. **Should the decision of the Committee be not to proceed, we will write to you summarizing the reasons for our decision and outlining the right of appeal procedures, pursuant to District Lodge Policy.** I hope to advise you of the Committees' decision within the next two (2) weeks.

I also wish to let you know that we were able [sic] facilitate the reinstatement of three (3) employees affected in the multiple termination proceedings, however I am unable to disclose the details as the terms of their individual settlements are confidential.

(emphasis added)

[42] During the summer period, Ms. Canniff had prepared "arbitration summaries" for the GC Committee. Those summaries included, *inter alia*, the notes the IAMAW representatives had taken, United's Step 3 Decisions, and the Complainants' original comments. The June, 2011 comments the Complainants had sent following the Step 3 Decisions at Ms. Canniff's request were not included.

[43] On August 17, 2011, after receiving this news from Ms. Canniff that United had reinstated three employees, Ms. Thacker asked for further information:

Hi Tania,

That is great news that 3 are back. That means the other 4 of us, have to struggle a bit more, but that we will be successful in the end.

When you say you are "unable to disclose the details as the terms of their individual settlements are confidential". What does that actually mean? Are they able to speak about their terms? Were they forced to sign a legal document, which requires them to keep silent? Did they have to do something different, which would have an adverse affect on the 4 of us? I would say silence at United is very weak since we heard that Tina was going back to work a week ago from a reliable source and a month ago from an unreliable source.

Thank you for your on-going work on our behalf.

Jen

(emphasis added)

[44] Ms. Canniff never responded to Ms. Thacker.

[45] Also on August 17, 2011, Ms. Sliacky wrote to Ms. Canniff and asked why she had not been informed of any developments:

> Hi Tania
>
> Excellent news for Maria, Venuse and Tina. I am happy for all of them. **I only have one question. Why was I not informed about these continued efforts to resolve the grievance with the employer? or was my case not involved in these efforts?**
>
> I will have new email address ... so please forward new mail to this address. Thank you
>
> Katarina
>
> (emphasis added)

G. September, 2011

[46] Ms. Sliacky wrote to Ms. Canniff again on September 2, 2011, after receiving no response to her August 17, 2011 inquiry:

> Hi Tania
>
> **It is over two weeks so I am wondering if Union have made a decision on my case.** This is my new email address and my cell phone number is ...
>
> Thank you
>
> [*sic*]
>
> (emphasis added)

[47] The GC Committee reviewed the Complainants' four grievances at the beginning of September, 2011.

[48] On September 7, 2011, the IAMAW sent each Complainant an identical letter advising them that their termination grievance would not be taken to arbitration. The letter dealt mainly with the Complainants' right to appeal the IAMAW's decision.

[49] Ms. Canniff in her August 16, 2011 email had advised the Complainants that they would receive a summary of the reasons for the IAMAW's decision about arbitration. The second paragraph of the September 7, 2011 letter gave the IAMAW's explanation for not proceeding with the Complainants' grievances:

> Given the evidence in this matter and the nature of the offense, we do not believe that the grievance would be successful. As such, we have decided not to proceed to arbitration regarding this matter.

[50] On September 8, 2011, the IAMAW wrote United and confirmed it had decided not to advance the Complainants' grievances to arbitration, subject to their right to appeal the decision. The IAMAW asked United to continue to hold all time limits in abeyance:

> Pursuant to Articles 11 and 12 of the Collective Agreement, the Union has decided not to advance the above mentioned grievance to arbitration, subject to the Grievor's Right of Appeal in accordance with District Lodge Policy.
>
> Please continue to hold all time limits in abeyance pending the Grievor's Right of Appeal process and we will advise you accordingly as to the disposition of the grievance.

H. November, 2011

[51] On November 2, 2011, counsel for the Complainants sent the IAMAW a letter. That 12-page letter, which included the words "WITHOUT PREJUDICE" on its first page, reviewed the facts and asked the IAMAW to take the Complainants' terminations to arbitration, failing which a DFR complaint would be filed with the Board.

[52] The letter concluded:

> The Employees ask that the Union take their terminations to arbitration. They are, of course, prepared to provide any further information you may require. If the Union is unwilling to do that, or it appears to the Employees that the Union is unwilling to do that, by November 15, 2011, my instructions are to proceed to file a complaint with the Canadian [sic] Industrial Relations Board under Section 37 of the *Code*.
>
> I ask that you contact me no later than November 15, 2011.
>
> (emphasis in original)

[53] The IAMAW did not respond to this letter.

[54] During the course of the hearing, the IAMAW objected to the admissibility of this letter into evidence on the basis it was a settlement letter. The Board concluded it was a demand letter rather than a settlement letter. Given the Board's broad discretion over evidence, as set out at section 16(*c*) of the *Code*, the letter was admitted into evidence.

I. December, 2011

[55] The Board received the Complainants' DFR complaint on December 5, 2011.

III. Issues

[56] This case raises two issues:

A) Did the IAMAW violate the *Code* in its representation of the Complainants; and

B) If the IAMAW violated the *Code*, what are the appropriate remedies?

IV. Parties' Positions

A. Complainants

[57] The Complainants raised multiple allegations which they suggested, on a cumulative basis, demonstrated that the IAMAW had acted arbitrarily when representing their interests.

[58] In addition, they suggested that evidence from the hearing regarding the three terminated, but later reinstated, employees demonstrated that the IAMAW had also acted in a discriminatory and/or bad faith manner.

[59] The Complainants suggested that Ms. Canniff never really understood the technicalities of the information United had provided about the alleged ticket irregularities. The IAMAW never called in a lawyer for assistance with the complexities of the case. Moreover they suggested that the IAMAW merely accepted what United gave them, and did not ask for any further documentation.

[60] In addition, after the IAMAW's initial efforts in the grievance process, the Complainants suggested that virtually all communication ceased with them following United's Step 3 Decisions.

[61] The Complainants argued that the lack of virtually any documentation concerning the three reinstated employees demonstrated clear discrimination. They suggested their interests were sacrificed for the benefit of the three other employees. The Complainants questioned how the IAMAW had produced no documentation about both the negotiation of the reinstatements, as well as about the later GC Committee process.

[62] In addition, the Complainants argued that only due to the Board's hearing did they learn that the reinstated employees had blamed them for their actions. The Complainants suggested this placed the IAMAW in a conflict of interest situation when it failed to disclose these allegations to them.

[63] Those allegations further explained, in the Complainants' view, the almost total lack of communication from the IAMAW following United's Step 3 Decisions. For example, the "arbitration summaries" Ms. Canniff prepared for the GC Committee were never run past the Complainants. The absence of communication also included the IAMAW's failure to respond to their legal counsel's demand letter.

[64] Similarly, Ms. Canniff never advised the Complainants that she did not support their request to go to arbitration. They only learned during the Board's hearing that the GC Committee's decision not to proceed to arbitration had been unanimous.

[65] The Complainants also suggested that the failure of several witnesses to testify, such as the union stewards or the other General Chairpersons, allowed the Board to draw an adverse inference. This was particularly the case when the Complainants claimed to have learned only at the hearing, from Ms. Canniff's evidence, about certain statements the stewards were alleged to have made.

[66] The Complainants also alleged that the IAMAW only produced a "sanitized" file for the hearing despite multiple production requests.

B. IAMAW

[67] The IAMAW asked the Board to look at its conduct in its entirety when evaluating the complaint, rather than at any isolated parts.

[68] When viewed from this perspective, the IAMAW submitted that the union properly carried out its duties.

[69] For example, the IAMAW argued that they clearly were aware of the relevant information as demonstrated by their continuing involvement from the February, 2011 employee interviews by United to the Step 3 Decision process. The IAMAW's stewards, who also worked at United, had sufficient knowledge to understand the employer's allegations.

[70] During this time frame, the IAMAW highlighted the numerous steps it took to assist the Complainants.

[71] IAMAW stewards attended the investigation meetings United held and took notes. The IAMAW contested the characterization that their representatives were merely deadweight at the meetings. In its view, a trade union's role when an employer meets with employees during an investigation, if any, would come from the collective agreement. The IAMAW rejected the suggestion that the local stewards should somehow object and possibly hinder United's legitimate posing of questions to its employees.

[72] Rather, the stewards ensured a proper record existed of what transpired in order to assist the union officials in charge of the case.

[73] The IAMAW further pointed to the steps it took in immediately filing grievances for all seven employees, making and sending the Complainants' copies of United's documentation, meeting with the Complainants to obtain their comments on those documents and requesting further written comments. It made representations at the Step 3 meeting and allowed the Complainants to comment themselves on the specific details of the ticketing allegations.

[74] In response to the suggestion of a lack of communication, the IAMAW suggested that there was little left for it to do with the Complainants following United's Step 3 Decisions, except to decide whether to go to arbitration. In any event, it argued a lack of communication, in the absence of prejudice, did not violate the *Code*.

[75] Following United's Step 3 Decisions, the IAMAW noted that Ms. Canniff took the time to prepare arbitration summaries for use by the two other General Chairpersons and her at the GC Committee meeting. Those arbitration summaries were never prepared for the Complainants' review. The Complainants had already had opportunities to give their input. The only issue remaining was for the IAMAW to review the files and make an informed decision.

[76] The IAMAW also disputed the suggestion that Ms. Canniff ought to have mentioned to the Complainants her personal views in advance of the GC Committee meeting. It would be important to go into that type of meeting with an open mind, since the two other experienced General Chairpersons might have many convincing arguments to make.

[77] Once the GC Committee had met, the IAMAW advised the Complainants of the decisions not to proceed to arbitration. The IAMAW admitted the reasons given to the Complainants were perhaps "skinny", but that was not enough in the overall context of this case to support a finding of a *Code* violation.

[78] The IAMAW argued that there was more than enough material on which it could make a reasoned decision not to proceed to arbitration. It urged the Board to accept Ms. Canniff's account of what occurred at the GC Committee as evidence of how it came to a clearly reasoned and rational decision.

[79] For the allegations of discrimination, the IAMAW argued that it simply received an offer from United for the three employees and it took the offer to them. According to Ms. Canniff, United viewed the three employees in a different light which is why is made that offer. But United had made no similar offer for the Complainants.

[80] The IAMAW also suggested the documentation showed there were distinctions on which the union could rely to agree to a settlement for three employees, while deciding not to contest the termination of the four Complainants.

[81] Similarly, it suggested there was no documentation of any type related to the settlements, other than United's agreements which the three employees signed.

[82] The IAMAW suggested that the earlier investigation documentation about the three reinstated employees (Ex–7 to Ex–9) corroborated United's decision to offer reinstatement.

[83] In addition, the IAMAW argued there was no evidence that the employer relied on the three employees' statements of feeling pressured as a reason not to give the same offer to the four Complainants.

[84] The IAMAW also argued that it did not have to prove the facts in the arbitration case. It only had to show the evidence the union gathered and on which it relied in coming to its conclusion. Ms. Canniff therefore could summarize as the IAMAW's sole witness the evidence that the union had before it. There was no obligation to call each witness to establish the evidence on which Ms. Canniff later relied.

C. United

[85] United, as federal employers regularly do in DFR cases, took the role of an observer on the merits of the Complainants' complaint against the IAMAW.

[86] United noted that an employer will usually only get involved if there are allegations of collusion between the union and the employees, or if it can assist the Board in clarifying any underlying facts: *Singh*, 2012 CIRB 639 (*Singh* 639) at paragraphs 78–79.

[87] United did ask, however, that if the Board found that the IAMAW had violated the *Code*, then it should be held harmless, from the date of the Complainants' discharge to the date of the Board's decision, for any damages an arbitrator might later award: *Cathy Miller* (1991), 84 di 122 (CLRB no. 854).

V. Duty of Fair Representation: Principles

[88] The parties did not dispute the well-known principles arising from the Board's DFR jurisprudence.

A. When does a trade union fulfill its duty under the *Code*?

[89] The Board in *McRaeJackson*, 2004 CIRB 290 (*McRaeJackson 290*) at paragraph 37 described the information it considers when evaluating whether a trade union has met its DFR duty:

> [37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; **and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.**
>
> (emphasis added)

B. Cases involving long service employees

[90] A long service employee does not have any greater right to have a grievance taken to arbitration than one with shorter service. Nonetheless, the Board will examine carefully those cases, like the instant one, where a trade union has decided not to challenge the termination of a long service employee: *Cheema*, 2008 CIRB 414.

[91] In *Schiller*, 2009 CIRB 435, an employee with almost 20 years of service contested his trade union's decision not to take his termination to arbitration. The Board considered the evidence from the trade union about the steps it took in reaching its decision not to proceed to arbitration. The Board found no violation of the duty:

> [59] In a duty of fair representation case, the Board does not sit in appeal of the bargaining agent's decision. Nonetheless, the Board will ensure that the bargaining agent followed a process in reaching a decision that was not arbitrary, discriminatory or carried out in bad faith.
>
> [60] In this case, the Board is satisfied that the difference between Mr. Schiller and the CAW is a question of judgment. Mr. Schiller understandably disagrees with the CAW refusing to give him a chance to contest his termination. Moreover, Mr. Schiller was well aware that the Tunnel would have the burden of proof and the arbitrator, even if he or she found that the Tunnel had proved its case, still had the power to intervene and modify the penalty of termination.

[61] However, the evidence demonstrates that the CAW did carry out an investigation and made discretionary judgment calls whether or not to take the case to arbitration. They immediately grieved when Mr. Schiller was terminated, attempted to settle the case on the basis of a last chance agreement, after getting Mr. Schiller's consent to do so, and sought to obtain further evidence from Dr. Soong in order to weigh the strength of the case they would have to put before an arbitrator.

[62] They clearly looked at the documentation in the case, some of which has been cited previously, and disagreed with Mr. Schiller about the impact of that documentation at arbitration.

[63] It is clear to the Board that another bargaining agent may well have chosen the route that Mr. Schiller wanted, given an arbitrator's extensive remedial powers and Mr. Schiller's blemish-free record.

[64] However, the Board's role is not to choose between Mr. Schiller's view and that of his bargaining agent. Rather, the Board must determine whether the CAW's process which led to its decision not to proceed to arbitration amounted to arbitrary, discriminatory or bad faith conduct.

[92] On different facts, however, such as those in *Singh* 639, *supra*, various failures by the union in its representation of a long service employee violated the *Code*. The failure to obtain the employee's views about key evidence from the employer constituted one of those failures:

[103] However, several other factors have convinced the Board that the Teamsters' investigation into Mr. Singh's situation amounted to arbitrary conduct.

[104] **In the Board's view, an agreement between the Teamsters and UPS not to show key documents to Mr. Singh, as a condition for Mr. Randall viewing them, deprived Mr. Singh of an important opportunity to know and comment upon the case against him**. At an arbitration hearing, any evidence in support of a just cause dismissal would have to be produced in its entirety, subject to any orders allowing limited redaction and admissibility.

[105] Experienced employers and trade unions often share information early in the grievance process. This process helps trade unions make the difficult judgment calls. But if an employer insists on confidentiality, and this demand hinders a grievor's ability to assist his or her union, then the union and the employer will have to live with the possible repercussions arising from this practice.

...

[108] **The facts demonstrate that Mr. Randall did not show Mr. Singh the various signed statements which made negative allegations about him. Mr. Randall also did not meet with all the individuals who signed statements, but still relied on them.**

[109] Mr. Randall did not show Mr. Singh the $350.00 cheque.

[110] **In the Board's view, a general comment to Mr. Singh on the phone about damaging evidence, without divulging the actual document or identifying the authors, prevented Mr. Singh from commenting knowingly on the case against him.**

[111] The Board was surprised how little documentary evidence the Teamsters provided at the hearing in support of its investigation of the termination of an employee with 18 years' service. The information the Teamsters did provide consisted mainly of what appear to be form letters.

...

> [116] The Teamsters also placed an immense amount of confidence in UPS' November, 2009 Investigation Report, without ever meeting with Mr. Singh to allow him to review and comment on its specific contents.
>
> [117] **As mentioned above, Mr. Singh would have been the best person to comment on the conclusions in UPS' report. Instead, without even meeting with Mr. Singh to show him the document, Mr. Randall described the Investigation Report as "formidable evidence" in support of his conclusion.**
>
> (emphasis added)

C. The Board's focus is on the process the trade union's evidence demonstrates it followed and not on what it could have done

[93] If the Board sat in appeal of a trade union's decision whether to go to arbitration, then it would not matter what the union actually did, or did not do, when it made its original decision about arbitration. Any and all arguments, whether new or not, could be reviewed in order to decide the "correctness" of the union's conclusion.

[94] But the Board does not sit in appeal of a trade union's decisions. The Board only concerns itself with the trade union's process and the steps it demonstrates it took in arriving at its decision. The correctness of the union's decision is irrelevant if its process violated the DFR duty it owed to the bargaining unit member.

[95] In *Singh* 639, *supra*, the Board described this principle:

> [81] Since the Board focusses on the trade union's process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema 414*):
>
> > [12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Vergel Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of the grievance, but it is used to assess how the union handled the grievance (see *John Presseault*, 2001 CIRB 138).
>
> [82] The Board's hearing is not the forum for a trade union to demonstrate that, if it had examined the matter more thoroughly, its original conclusion would still be correct.
>
> [83] The Board raised this issue during the hearing several times because of concerns over the relevance of certain questions being asked.

> [84] In this case, the Board was interested in precisely what the Teamsters did, mainly through Mr. Randall, in order to arrive at its March 15, 2010 conclusion not to go to arbitration. A DFR hearing is not the place for the trade union to do a new investigation of the matter, via cross-examination by highly-skilled counsel, in order to justify the correctness of its original conclusion.
>
> [85] There are two problems if a trade union is permitted to do its investigation a second time during a DFR hearing. Firstly, it loses sight of the Board's obligation to concentrate on the actual process which took place. Secondly, it invites the Board to delve into the correctness of the trade union's decision. That is not the Board's role. The Board will respect a trade union's judgment calls on these issues, provided its process met the standards imposed by section 37 of the *Code*.
>
> [86] The Board has decided this case based on what the Teamsters actually did when evaluating Mr. Singh's case. The Board is not persuaded that things which could have been done, but were not, have any relevance to its analysis.

[96] As described in the next section, the Board will determine the weight to give to a trade union's evidence about the process it conducted at the material times.

D. Burden of Proof

[97] In a DFR case, the complainant bears the burden of proof to demonstrate that the trade union violated the *Code*. The Board commented on this burden in *Griffiths*, 2002 CIRB 208:

> [37] The onus under a section 37 complaint rests with the complainant to present evidence that is sufficient to raise a presumption that the union has failed to meet its duty of fair representation unless rebutted. In order to satisfy that onus, it is imperative that the complainant show, to the satisfaction of the Board, that the union was aware of the situation giving rise to the complainant's concerns and that the union's subsequent actions taken on behalf of the complainant, in the absence of any evidence to the contrary, were in some way arbitrary, discriminatory or taken in bad faith. Moreover, as held by the Board's predecessor, the Canada Labour Relations Board (the CLRB), in *Craig Harder* (1984), 56 di 183; and 84 CLLC 16,043 (CLRB no. 472), there is not an obligation on the part of the union to seek out or solicit grievances from its members. The obligation to contest the employer's action rests squarely with the employee. It is, therefore, also the employee's obligation to ensure the union is aware of the circumstances.

[98] The burden of proof always remains on the complainant.

[99] This does not mean, however, that there is no evidentiary obligation on the respondent trade union. If the complainant has made out a *prima facie* case of a *Code* violation during its evidence, then the respondent trade union has an evidential burden to respond to that evidence and, in particular, establish the concrete steps it took to represent its bargaining unit member(s).

[100] In *Peel Law Association* v. *Pieters*, 2013 ONCA 396 (*Peel*), the Ontario Court of Appeal examined the difference between the burden of proof, which remains constant, and the shifting of the evidential burden:

> [71] Sopinka J. explained the difference between the burden of proof and the evidential burden in *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73, a medical malpractice case. Medical malpractice cases are an apt comparison to discrimination cases because as Sopinka J. observed, at p. 322 S.C.R., "The physician is usually in a better position to know the cause of an injury than the patient." At pp. 328-29 S.C.R., he said that in medical malpractice cases because "the facts lie particularly within the knowledge of the defendant... very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary". He recognized that "[t]his has been expressed in terms of shifting the burden of proof" and went on to explain why that is not correct. At pp. 329-30 S.C.R., he said:
>
> > It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.
>
> (citations omitted) [page 26]

[101] In a DFR case, this evidential burden requires the trade union to lead evidence on matters which are uniquely within its knowledge. This does not constitute a reversal of the burden of proof when a tribunal requires a respondent to provide an explanation, as discussed further in *Peel*, *supra*:

> [75] Turning to this case, the Divisional Court's reasoning that the vice-chair reversed the burden of proof contains two errors.
>
> [76] First, the Divisional Court lost sight of the distinction between the burden of proof and the evidential burden. The vice-chair having found a *prima facie* case existed properly looked to the respondent to provide an explanation.
>
> [77] Second, the Divisional Court went on to state [at para. 37] that "[b]y improperly reversing the burden of proof, the Tribunal placed [the librarian] in the difficult position of trying to prove a negative, namely, that her conduct in the performance of her routine duties was not motivated by race or colour". **The shifting of the evidential burden does not put the respondents in the position of having to prove a negative. Rather, it puts them in the position of having to call affirmative evidence on matters they know much better than anyone else – namely, why they made a particular decision or took a particular action.**

> [78] I conclude that the Divisional Court erred in law in finding the vice-chair reversed the burden of proof.
>
> (emphasis added)

[102] The Board, as in any case, will decide the weight to give to the evidence presented about a trade union's process.

VI. Analysis and Decision

A. Did the IAMAW violate the *Code* in its representation of the Complainants?

[103] The Board earlier set out its conclusion that the IAMAW did not meet its duty under section 37. This does not mean, however, that the Board accepted all of the Complainants' arguments. Indeed, the IAMAW's handling of the grievances up to the conclusion of the Step 3 process was beyond reproach.

[104] The *Code* violation developed after United provided its Step 3 Decisions. For whatever reason, the IAMAW seemed to lose interest in representing the Complainants.

1. The IAWAW's process from February to June, 2011

[105] The Complainants suggested that the IAMAW's stewards should have objected to, and obstructed, United's investigation. No evidence was ever lead about the rights, if any, the IAMAW had negotiated with regard to its representation role during a United investigation.

[106] The evidence satisfied the Board that the IAMAW ensured the Complainants had union representatives with them and that a proper record was kept of the initial investigation meeting. A proper record of events is invaluable if a procedural or evidentiary dispute later arises in the grievance process, or at arbitration. That evidence may also be key if ever a DFR complaint is made to this Board. The IAMAW was doing exactly what experienced trade unions do when it gathered and catalogued this information.

[107] After the investigation interviews, the IAMAW then obtained from United the documentation on which it intended to rely. The Complainants received the opportunity to meet with their stewards and Ms. Canniff to discuss the documentation.

[108] The Complainants further took advantage of an opportunity to give the IAMAW additional information in writing. The IAMAW relied on these comments from the Complainants when it put forward various arguments to United.

[109] The fact that the IAMAW allowed the Complainants to explain the alleged ticketing irregularities directly to United at the Step 3 meeting does not suggest any *Code* violation. The Complainants were best placed to explain what occurred.

[110] The Complainants suggested the IAMAW ought to have called in a lawyer to assist them. The Board dismisses this argument. Every union has finite resources to manage. It decides whether it needs legal counsel at all. Indeed, many unions train their own representatives to deal with cases which might, in earlier times, have been sent to outside counsel.

[111] The evidence showed that Ms. Canniff at this stage was meticulous in ensuring that the IAMAW had the relevant information. She herself had typed up the handwritten notes she had taken in her meetings with the Complainants.

[112] Despite the IAMAW's admirable start in representing the Complainants, various subsequent events demonstrate it violated its DFR duty.

2. The IAMAW ceased virtually any contact with the Complainants

[113] Following receipt of United's June, 2011 Step 3 Decisions, an unexplained change in attitude occurred in the IAMAW's dealings with the Complainants.

[114] Ms. Canniff never contacted the Complainants about the requested written comments they had supplied to her contesting various aspects of the Step 3 Decisions. Ms. Canniff's later arbitration summaries, prepared for the GC Committee for the express purpose of deciding whether to go to arbitration, did not include these additional written comments. The Complainants' efforts at Ms. Canniff's request to add additional information were seemingly a waste of time.

[115] Moreover, Ms. Canniff ignored almost all of the emails the Complainants later sent to her. The IAMAW argued that after the Step 3 Decisions arrived there was virtually no further need for the IAMAW to communicate with the Complainants. The Board disagrees as will be examined in the next section.

3. The failure to disclose relevant information to the Complainants

[116] The Complainants only learned at the Board's hearing, from documents which were the subject of a production order, that the reinstated employees had partially blamed them for their actions. A situation like this places a trade union in a challenging position. The Board dismisses the Complainants' suggestion that the IAMAW found itself in a conflict of interest and violated the *Code* by continuing to act for them.

[117] A trade union may often represent individuals with competing interests. That situation must be handled adroitly, but it does not prevent a trade union from carrying out its functions.

[118] The Board has found a union violates its DFR duty if it fails to put relevant employer evidence to the grievor for an explanation: *Singh 639, supra*.

[119] The Board can find no principled reason why the same concept would not apply when a trade union has received prejudicial allegations by some employees against others.

[120] It was incumbent on the IAMAW to put those negative allegations to the Complainants for comment. The Board does not need to determine whether these negative comments, or something else, were behind the IAMAW's change in attitude toward the Complainants. It is the clear existence of this change, without any satisfactory explanation, which supports a finding of a violation of the *Code*.

4. Evidence about the IAMAW's process

[121] The Complainants argued the Board should draw an adverse inference from the fact that the IAMAW did not call any stewards as witnesses, given that they had key information about its process. The IAMAW argued that it only needed to have Ms. Canniff testify about the evidence she had in her possession; that evidence did not need to be proved since that would go to the merits of the arbitration case.

[122] The Board will not draw an adverse inference in the way the Complainants request. A trade union decides how it will plead its case as part of its evidential burden: *Peel*, *supra*. The Board then has to decide how much weight to give to that evidence.

[123] The Complainants further suggested that the union's file had been "sanitized" given the almost total absence of documentation relating, *inter alia*, to the reinstatement of the three employees' and the proceedings of the GC Committee.

[124] If there is any suggestion from the use of the word "sanitized" that the IAMAW did not produce documents, despite an order to do so, then the Board finds no evidence from the Complainants to support this allegation. If a party has not kept any documentary evidence for use at a potential later hearing, or if it chose not to document parts of its process, then its legal counsel cannot produce non-existent documentation.

[125] But the Board may take into consideration a lack of documentary evidence about key events, especially with regard to the reinstatement of three of the seven terminated employees. It is relevant as but one factor concerning the weight the Board should give to Ms. Canniff's oral evidence about the IAMAW's process.

[126] Ms. Canniff was initially quite detailed at keeping records, as one would expect from someone who regularly assists members with grievances and at arbitration. She kept steward notes, made notes herself of what the Complainants told her, first by hand and then by typing them.

[127] However, this attention to detail seemed to disappear following receipt of United's Step 3 Decisions in early June, 2011.

[128] As communications ceased with the Complainants, so did any documentation of the IAMAW's process. The Board has complete sympathy for Ms. Canniff's personal situation given her difficult summer in 2011. But despite these issues, the IAMAW remained subject to its DFR duty. It left Ms. Canniff in charge of handling the Complainants' terminations.

[129] Any evidence about the settlement struck by United and the IAMAW to reinstate three of the seven terminated employees came almost exclusively from Ms. Canniff's oral testimony.

The IAMAW admitted there were no emails, notes from telephone conversations, exchanges of legal drafts or anything else about these negotiations and the reinstatement of the three employees.

[130] The only documents were the agreements United sent to Ms. Canniff which the three reinstated employees signed unchanged. Those agreements are subject to a confidentiality order, so the Board will not go into any further detail.

[131] The Complainants alleged that the lack of any documentation was "astounding" and supported their view that a horse trade had taken place, i.e. United agreed to take back three employees, in exchange for the IAMAW agreeing to drop the grievances of the other four. Under this theory from the Complainants, of course, the later GC Committee meeting would have been a complete sham.

[132] The Board does not need to make any finding on this allegation that a "horse trade" occurred in this case. The Board's focus is on the weight to give to the IAMAW's evidence about the process it carried out.

[133] It would seem reasonable that an experienced trade union would document the process it followed which lead to the reinstatement of three out of seven terminated long service employees. An almost total lack of documentation about this key event, despite its prior attention to record keeping, impacts the weight which the Board can give to Ms. Canniff's oral testimony.

[134] The same comment applies to the circumstances surrounding the GC Committee decision. Ms. Canniff's arbitration summaries were filed in evidence. She testified about the elements she says the GC Committee considered.

[135] But, again, not a single note or email exists about this teleconference meeting. No minutes were taken of the discussions. No emails were exchanged by the three participants either before or after the meeting.

[136] Ms. Canniff's evidence did not provide the Board with a sufficient explanation in response to the Complainants' evidence of arbitrary and discriminatory behaviour.

5. The IAMAW failed to give the Complainants any reasons for its decision not to go to arbitration

[137] While the IAMAW may have characterized the reasons in its September 7, 2011 letters as "skinny", the Board finds it failed to give the Complainants any explanation why they could not contest their terminations before an arbitrator. This lack of an explanation occurred against the backdrop of the reinstatement of the other three terminated employees just a few weeks earlier.

[138] The IAMAW also decided not to respond to the Complainants' legal counsel's lengthy November, 2011 demand letter. This was a second missed opportunity to provide reasons.

[139] A refusal to provide reasons raises the troubling question of whether long service union members must file a complaint with the Board in order to learn, at even a basic level, the specific reasons why their grievances did not go to arbitration. The Board is not suggesting a trade union needs to provide written reasons in the way tribunals do. But there needs to be some concrete explanation, especially for the four Complainants who had, collectively, over 60 years of service at United.

[140] In labour arbitration, an employer must provide its grounds at the time it terminates an employee. It usually cannot later change or add to those grounds. In a similar light, the Board in *McRaeJackson 290*, *supra*, indicated a key factor to consider is whether the trade union provided reasons for its decision not to go to arbitration.

[141] It does not appear overly demanding to require a trade union, at the end of its process, to provide an explanation to an employee why his/her grievance will not go any further. If providing nothing of substance to a grievor is designed to provide a trade union with greater flexibility at a future DFR hearing, then this strategy may be suspect. The Board examines what a trade union actually did, not what it could have done: *Singh 639*, *supra*.

[142] As noted in the chronology of events, Ms. Canniff represented to the Complainants on August 16, 2011 that if the GC Committee decided not to go to arbitration then they would provide a summary of their reasons. In the September 7, 2011 letter, the IAMAW said only this:

> Given the evidence in this matter and the nature of the offense, we do not believe that the grievance would be successful. As such, we have decided not to proceed to arbitration regarding this matter.

[143] A bald conclusion does not constitute the type of reasons to which *McRae/Jackson 290*, *supra*, referred.

[144] The Board has concerns when a trade union fails to tell a member its reasons for not proceeding to arbitration. How can a union member realistically file an internal union appeal if he/she has no idea why the union decided not to go to arbitration? How can that member argue that the union's officers might have misunderstood the evidence, especially if some similarly situated employees were reinstated, if the trade union does not provide any explanation of its reasons?

[145] This lack of reasons, whether standing alone, or as just another aspect of the IAMAW's process, satisfies the Board that the IAMAW violated its duty under the *Code*. The Complainants are therefore entitled to certain remedies.

B. If the IAMAW violated the *Code*, what are the appropriate remedies?

[146] The Board has considered the parties' submissions on remedy. Sections 99(1)(*b*) and 99(2) of the *Code* provide the Board with a broad remedial discretion. The overriding principle is that any remedy must be rationally connected to the breach of section 37 of the *Code*.

[147] The Board orders the following remedies:

1. The Complainants' grievances are to proceed to arbitration; any time limits in the collective agreement are waived.

2. The Complainants shall be entitled to retain counsel of their choice for their arbitration.

[148] In some DFR cases, the Board may consider whether the trade union, despite a *Code* breach, ought to retain carriage of the grievance. If there is no adversarial relationship between the trade union's representatives and the employee(s), then the status quo may be appropriate.

[149] However, in cases where there is a clear adversarial relationship between the trade union and the employees, as occurred in this case, then the Board has no realistic option but to allow successful complainants to retain their own counsel: *Singh 639*, *supra*, at paragraphs 139–142.

3. The IAMAW shall pay the reasonable legal costs for the Complainants' choice of counsel for arbitration and will cooperate with any reasonable requests for information and assistance.

[150] This remedial order assumes that the four Complainants retain a single counsel to represent their interests at arbitration. All four used the same counsel for this DFR complaint.

[151] The Board may revisit this aspect of its order if any suggestion arises that the Complainants cannot all be represented at arbitration by the same counsel.

[152] The reasonable legal costs owing will be as agreed between the parties. If no agreement is reached, then the parties may file written submissions in this regard with the Board. The Board will then issue its decision forthwith.

4. If an arbitrator orders any compensation to be paid to any or all of the Complainants, then the IAMAW shall pay such sums for the time period starting from the date the Complainants filed their complaint (December 5, 2011) to the date of this decision.

[153] United argued that the IAMAW should be held responsible to pay compensation from the date of the Complainants' dismissals to the date of the Board's decision. Other decisions have suggested the trade union is responsible from the date of the filing of the complaint to the date of the Board's decision.

[154] In this case, the Board will follow the reasoning as described in *Canada Post Corporation*, 2010 CIRB 558, at paragraphs 28–29:

> [28] CPC ought not to be responsible for any increased damages, if any, awarded by the arbitrator, for the period during which Ms. Sapra came before the Board and pleaded her DFR complaint.
>
> [29] As a result, the Board modifies its original decision on remedy by clarifying that CPC shall not be responsible for any damages awarded by the arbitrator, if any, from the date Ms. Sapra filed her complaint with the Board (March 3, 2009) to the date of the *Sapra 533* decision (July 23, 2010). APOC will be responsible for any damages awarded to Ms. Sapra for this time period.

[155] Normally, if an arbitrator awarded any compensation pursuant to the collective agreement, the employer would be wholly responsible for paying that sum. That is the natural consequence of its breach of the collective agreement.

[156] However, the Board has noted in numerous cases that it would be unfair for the employer's liability to be increased as a result of additional delays caused by a trade union's breach of the *Code*. As a result, the Board may hold the trade union responsible for the increase in any compensation awarded.

[157] In the Board's view, the use of the date of the filing of the DFR complaint is generally preferable as a starting point for the apportionment of the payment of any compensation. Firstly, the grievance process required by the collective agreement generally takes some time to complete. In cases not involving a DFR complaint, the employer remains responsible for compensation occurring during this time period. Making the trade union responsible from the date of the dismissal implicitly suggests that the DFR violation occurred at this date. That seems highly unlikely in most cases.

[158] Secondly, the 90-day time limit at section 97(2) of the *Code* requires complainants to bring their complaints promptly. The filing of the complaint is an appropriate time to transfer potential responsibility for increased compensation from the employer to the trade union. The trade union may well have met its duty for many months, as the IAMAW did in this case, before any issues of *Code* liability began to develop.

[159] Evidently, in appropriate situations, a party remains free to argue that a date other than the date of the filing of the complaint should be used when considering this apportionment issue. However, there was nothing particular about this case which persuaded the Board to select another time period for the apportionment of compensation.

5. Compensation for costs related to the instant complaint

[160] The Complainants also asked for their legal costs incurred in bringing this complaint.

[161] The Board's policy is generally not to award costs. This reflects in part the understanding and practice pursuant to which employers and trade unions each pay for their own representation costs in labour relations proceedings.

[162] Nonetheless, in exceptional situations, the Board may award costs to an employer or a trade union: see, for example, *Monarch Transport Inc. and Dempsey Freight Systems Ltd.*, 2004 CIRB 301.

[163] There is no similar understanding or practice between employees, and either their trade union or their employer, that each side will pay its own costs. This may explain why the Board tends to award some costs on the rather rare occasions when a complainant succeeds in a DFR complaint.

[164] The Federal Court of Appeal in *Canadian Air Line Pilots Assn.* v. *Eamor*, [1997] F.C.J. No. 859, confirmed that the Board may award costs in a DFR complaint:

> **5** As for the remedy ordered by the Board, with respect to which the same standard of review is applicable, we see no more reason to intervene. On the one hand, the award of costs was rationally connected to the section 37 breach and its consequences within the meaning of subsection 99(2). On the other hand, a potential award of damages, provided it be established as having a direct causal link to the breach, is not in itself insupportable under the broad remedial discretion conferred by subsection 99(2) as it is not punitive in nature, does not infringe the Canadian Charter of Rights and Freedoms, and does not contradict the purposes of the Code (cf. Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369).

[165] We are of the view that the IAMAW should contribute to the costs the Complainants incurred in bringing this complaint. Such a contribution is rationally connected to the IAMAW's breach of the *Code*.

[166] In this case, as already summarized, the Complainants were never told "why" their grievances would not be taken to arbitration, other than with a boilerplate conclusion that their grievances would not be successful. Similarly, despite retaining legal counsel to send a lengthy demand letter, the IAMAW never responded.

[167] The IAMAW only set out its initial position in writing after the Complainants made this complaint with this Board.

[168] It was during the oral hearing itself that the Complainants learned of some prejudicial evidence the IAMAW had about them. They had never had a chance to respond to it.

[169] These actions led to the Complainants engaging the services of legal counsel to represent them. A contribution to those costs is rationally connected to that breach.

[170] Rather than making this process more formal than should be the case in labour relations matters, and in order to avoid any further expense to the parties, the Board will simply fix the amount of this contribution. It is not intended to be an award of costs on either a party and party or solicitor and his/her own client basis. It is merely a contribution towards costs.

[171] Other processes exist to deal with the specifics of any legal fees actually invoiced to the Complainants.

[172] In arriving at the amount of the compensation to be ordered, the Board considered certain factors linked directly to the oral hearing in this case such as:

i) the complexity of the matter;
ii) the efficiency with which the case was pleaded;
iii) the length of the hearing
iv) delays and
v) the result.

[173] The Board accordingly fixes the amount of the IAMAW's contribution to the Complainants' costs at a lump sum of $15,000.

[174] The Board remains seized of any issues arising from this decision and, in particular, its remedial orders.

[175] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Terence Lineker
Member